

United States
Circuit Court of Appeals
For the Ninth Circuit.

HENRY ROSENFELD, as Sole Surviving Trustee of the Trust Created by the Last Will and Testament of JOHN ROSENFELD, Deceased,

Plaintiff in Error,

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Northern District of California,
Second Division.

Filed

OCT 20 1916

F. D. Monckton,
Clerk.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 2846.

LOUIS ROSENFELD et al.,

Plaintiffs in Error,

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue,
etc.

Defendant in Error.

Stipulation That Entire Record be not Printed.

It is hereby stipulated and agreed that the original exhibits and the following designated papers need not be printed in the Transcript of Record; Petition for Writ of Error; Citation on Writ of Error; Order Allowing Writ of Error; Cost Bond; Stipulation Waiving Jury, etc.; Memorandum of Costs; Orders of Court Overruling Demurrers to Complaint and Amended Complaint; Praeceptum for Record; Stipulation as to Original Exhibits; Summons and Marshal's Return; Demurrers to Complaint and Amended Complaint; Orders Extending Time for Return Day of Writ of Error; Title of Court and Cause to all papers except first one.

Dated August 24, 1916.

JOHN W. PRESTON,

United States Attorney.

MARSHALL B. WOODWORTH,

Attorney for Plaintiffs in Error.

[Endorsed]: No. 2846. In the United States Circuit Court of Appeals for the Ninth Circuit. Louis

Rosenfeld et al., Plaintiffs in Error, vs. Joseph J. Scott, Collector of Internal Revenue, etc., Defendant in Error. Stipulation That Entire Record be not Printed. Filed Aug. 26, 1916. F. D. Monckton, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

LOUIS ROSENFELD and HENRY ROSENFELD,
as Trustees Under the Last Will and Testa-
ment of JOHN ROSENFELD,

Plaintiffs,

vs.

AUGUST E. MUENTER, Collector of Internal Revenue,

Defendant.

Complaint.

Plaintiffs above named complain of the defendant and respectfully state as follows:

I.

That the defendant, August E. Muentner, is now, and has been since the 1st day of October, 1907, the duly appointed, qualified and acting Collector of Internal Revenue of the United States for the First Collection District of California, having his official place of residence in the City and County of San Francisco, State and Northern District of California.

II.

That previous to said 1st day of October, 1907, when said defendant, August E. Muentner, became the duly appointed, qualified and acting Collector of

Internal Revenue as aforesaid, John C. Lynch was and had been during all of the times in this complaint alleged up to the 1st day of October, 1907, the duly appointed, qualified and acting Collector of Internal Revenue of the United States for the First Collection District of California, having its official place of residence in the City and County of San Francisco, State and Northern District of California, and was succeeded on said 1st day of October, 1907, as Collector of Internal Revenue, by the defendant, August [2*] E. Muentner, as aforesaid.

III.

That on May 28th, 1902, John Rosenfeld died in the City of New York, being at the time of his death and for a long time previous thereto, a resident of the City and County of San Francisco, State and Northern District of California, leaving a last will and testament, which was thereafter admitted to probate by the Superior Court of the State of California, in and for the City and County of San Francisco, on or about June, 15, 1902.

IV.

That, according to the terms of said last will and testament, Louis Rosenfeld and Henry Rosenfeld were duly named and appointed the executors of said last will and testament of John Rosenfeld, deceased.

V.

That, on or about June 15, 1902, letters testamentary of the said will were duly issued and granted to the said Louis Rosenfeld and Henry Rosenfeld, by

*Page-number appearing at foot of page of original certified Transcript of Record.

the Superior Court of the State of California, in and for the City and County of San Francisco, and said Louis Rosenfeld and Henry Rosenfeld thereupon duly qualified and entered upon their duties as such executors, and ever since have been and now are the duly appointed, qualified and acting executors of said last will and testament of said John Rosenfeld, deceased.

VI.

That the residuary personal property left by said testator by the terms of the said will as aforesaid, as estimated by said John C. Lynch, the then Collector of Internal Revenue as aforesaid, for the purpose of the Federal succession tax (which estimate is for the purpose of this action acquiesced in by the plaintiff) amounted in value as follows, to wit:

The share of the estate left to Mrs. Margitta Fischer, a [3] sister of John Rosenfeld, deceased, the sum of \$20,000;

The share of the estate left to Henrietta Romer, a daughter of said John Rosenfeld, deceased, the sum of \$57,969.55;

The share of the estate left to Sarah Eppstein, another daughter of said John Rosenfeld, deceased, the sum of \$57,969.55;

The share of the estate left to Lucy Isabella Weill, another daughter of said John Rosenfeld, deceased, the sum of \$57,969.55;

The share of the estate left to Max S. Rosenfeld, a son of said John Rosenfeld, deceased, the sum of \$57,969.55;

The share of the estate left to Louis Rosenfeld, an-

other son of said John Rosenfeld, deceased, the sum of \$57,969.55;

The share of the estate left to Henry Rosenfeld, another son of said John Rosenfeld, deceased, the sum of \$57,969.55.

VII.

That, on the 29th day of July, 1903, the said John C. Lynch, assuming to act as such Collector of Internal Revenue as aforesaid, and under the Act of Congress commonly known as the "War Revenue Law" of June 13, 1898 (also known as the Federal succession tax law), did by force and duress exact, demand and collect, from said executors of said last will and testament of said John Rosenfeld, deceased, the sum of four thousand and sixty-two and 90/100 (4,062.90) dollars, claiming the same to be a lawful assessment under said Act on account of the legacies above set forth.

That said tax of \$4,062.90 was imposed and assessed by said John C. Lynch, as the then Collector of Internal Revenue as aforesaid, as follows:

On the sum of \$20,000, the same being the share of the estate left to Mrs. Margitta Fischer, a sister of the testator, John Rosenfeld, deceased, the tax of \$150, being at the rate of 75 cents for every hundred dollars of said sum of [4] \$20,000; on the further sum of \$57,969.55, the same being the share of the estate left to Henrietta Romer, a daughter of said testator, the tax of \$652.15, being at the rate of \$1.121½ for every hundred dollars of said sum of \$57,969.55; on the further sum of \$57,969.55, the same being the share of the estate left to Sarah Eppstein,

a daughter of said testator, a tax of \$652.15, being at the rate of \$1.12 $\frac{1}{2}$ for every hundred dollars of said sum of \$57,969.55; on the further sum of \$57,969.55, the same being the share of the estate left to Lucy Isabella Weill, a daughter of the testator, the tax of \$652.15 being at the rate of \$1.12 $\frac{1}{2}$ for every hundred dollars of said sum of \$57,969.55; on the further sum of \$57,969.55, the same being the share of the estate left to Max S. Rosenfeld, a son of the testator, the tax of \$652.15, being at the rate of \$1.12 $\frac{1}{2}$ for every hundred dollars of said sum of \$57,969.55; on the further sum of \$57,969.55, the same being the share of the estate left to Louis Rosenfeld, a son of the testator, the tax of \$652.15, being at the rate of \$1.12 $\frac{1}{2}$ for every hundred dollars of said sum of \$57,969.55; on the further sum of \$57,969.55, the same being the share of the estate left to Henry Rosenfeld, a son of the testator, the tax of \$652.15 being at the rate of \$1.12 $\frac{1}{2}$ for every hundred dollars of said sum of \$57,969.55.

VIII.

That said sum of \$4,062.90 was paid from the funds and property of said estate by said executors of said last will and testament of John Rosenfeld, deceased, as aforesaid, involuntarily and under protest and protesting that they were not as such executors, nor was the estate represented by them, nor were said legacies hereinabove named, or any of them, liable to pay said tax. [5]

VIII $\frac{1}{2}$.

That on June 30, 1903, the said Louis Rosenfeld and Henry Rosenfeld were discharged as executors

by order and decree of the Superior Court of the State of California, in and for the City and County of San Francisco, and said Court thereupon appointed said Louis Rosenfeld and Henry Rosenfeld trustees of said estate under the terms of said last will and testament of John Rosenfeld, deceased, and said *Henry* Rosenfeld and Henry Rosenfeld ever since have been and now are the duly appointed, qualified and acting trustees of said estate.

IX.

That each and every of the shares of said estate left to said legatees above named were paid to said persons and each of them on or about June 30, 1903, by order of the Superior Court of the State of California, in and for the City and County of San Francisco.

X.

That thereafter and on June 2, 1905, Louis Rosenfeld and Henry Rosenfeld, as trustees, aforesaid of said last will and testament of John Rosenfeld, deceased, duly filed with said John C. Lynch, the then Collector of Internal Revenue for the First Collection District of California, a claim for the refunding of said tax of \$4,062.90, so collected as aforesaid, and appealed to the Commissioner of Internal Revenue, from the action and decision of said John C. Lynch, as the then Collector of Internal Revenue as aforesaid, in holding said executors of the last will and testament of said John Rosenfeld, deceased, and the estate represented by them as such executors and the legacies above mentioned, and each of them, liable to the payment of said legacy tax of \$4,062.90,

and in collecting the said legacy tax in the manner aforesaid, and represented to the said Commissioner that the collection of said tax was unlawful and that the [6] amount thereof should be refunded for the following reasons among others:

That said John Rosenfeld died in the City of New York on May 28, 1902, and under the United States statutes as they then stood, no war revenue tax became due or payable for one year after death; that said law was repealed and said appeal became effective July 1, 1902; that, under the decisions of *Capp v. Mason*, 94 U. S. 589, *Mason v. Sargent*, 104 U. S. 689, *Eideman, Collector of Internal Revenue, etc., v. Tilghman et al., executors, etc.*, 136 Fed. Rep. 141, the legacy internal revenue tax imposed and collected by said John C. Lynch, the then Collector of Internal Revenue as aforesaid, was and is illegal and erroneous and without authority of law, and should be refunded.

XI.

That more than six months have expired since the taking of said appeal to said Commissioner for the refunding of said tax, and said Commissioner has neither allowed nor disallowed said claim.

XII.

That no part of said tax of \$4,062.90 has been refunded or repaid to said plaintiffs, as such executors or otherwise or to the estate represented by them, or to said legatees above mentioned or to any other person, or at all, and that the said sum of \$4,062.90 is still due, owing and unpaid.

WHEREFORE, plaintiffs demand judgment against the defendant for the sum of \$4,062.90 with interest and costs of this action.

MARSHALL B. WOODWORTH,
EDWARD LANDE,

Attorneys for Plaintiff. [7]

State of California,

City and County of San Francisco,—ss.

Louis Rosenfeld, being duly sworn, deposes and says:

That he is one of the plaintiffs in the above-entitled action, that he has read the within Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to matters which are therein stated on his information and belief, and as to those matters, he believes them to be true.

LOUIS ROSENFELD.

Subscribed and sworn to before me this 27th day of November, 1907.

[Seal]

CHARLES EDELMAN,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires April 9, 1910.

[Endorsed]: Filed November 27, 1907. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [8]

[Title of Court and Cause.]

Answer.

Comes now the defendant and answering plaintiff's Complaint on file herein admits, denies and alleges as follows:

I.

Admits the allegations of paragraph I of plaintiffs' Complaint.

II.

Admits the allegations of paragraph II of plaintiffs' Complaint.

III.

Admits the allegations of paragraph III of plaintiffs' Complaint.

IV.

Admits the allegations of paragraph IV of plaintiffs' Complaint.

V.

As to the allegations of paragraph V of plaintiffs' Complaint to the effect that Louis Rosenfeld and Henry Rosenfeld were at the time of the commencement of this action the duly appointed, qualified and acting executors of the last will and testament of John Rosenfeld, deceased, defendant alleges that he [13] has no information or belief sufficient to enable him to answer the said allegations, and placing his answer upon said ground, he denies that the said plaintiffs were such executors or that either of them was an executor of said will at said time, either appointed, or qualified, or acting.

VI.

Admits the allegations of paragraph VI of plaintiffs' Complaint.

VII.

Admits the estate of the said John Rosenfeld, deceased, paid the legacy tax of Four Thousand Sixty-two and 90/100 (4,062.90) Dollars imposed and assessed as set forth in paragraph VII of said Complaint upon the legacies of personal property mentioned and described in said paragraph VII and in said paragraph VI of the plaintiffs' Complaint. Defendant denies that he collected the said taxes or any portion thereof by force or duress, or by force or duress. Defendant alleges that the taxes were voluntarily paid and that there was no force, actual or threatened, and no duress of any kind exercised by defendant, in either exacting, demanding or collecting the said tax.

VIII.

Defendant denies that the said taxes were or that any portion thereof was paid under protest, either oral or in writing or under any claim of any kind specifying that the said taxes were unlawful and that there was no liability to pay the same, or under any other claim of illegality whatever.

IX.

As to the allegations of the said Complaint to the effect that the plaintiffs are the owners of the alleged cause of action set forth in plaintiffs' Complaint, defendant alleges that he has no information or belief sufficient to enable him to answer the said

allegations, and placing his answer upon that ground, [14] he denies that the plaintiffs own or have any interest, or either owns or has any interest in the alleged cause of action set forth in plaintiffs' Complaint; and upon the same ground the defendant denies that the plaintiffs are or that either of them is trustee of the said estate.

X.

Admits the allegations of paragraph X of plaintiffs' Complaint.

XI.

Admits that no part of the said taxes paid as herein admitted or alleged has ever been repaid by the defendant, or the United States of America.

WHEREFORE defendant prays that plaintiff take nothing by this action, and for costs of said suit,

ROBT. T. DEVLIN,

United States Attorney,

Attorney for Defendant. [15]

State and Northern District of California,
City and County of San Francisco,—ss.

August E. Muentert, being first duly sworn, deposes and says:

That he is the Collector of the Internal Revenue of the United States for the First Collection District of California, and the defendant herein; that he has read the foregoing Answer and knows the contents thereof; that the same is true except as to the matters which are therein stated on information and

belief, and that as to those matters, he believes it to be true.

AUG. E. MUENTER.

Subscribed and sworn to before me this 9th day of October, 1908.

[Seal]

W. B. MALING,

Deputy Clerk U. S. Circuit Court, Northern District of California.

Service of the within Answer by copy admitted this — day of Oct. 1908.

MARSHALL B. WOODWORTH,

Attorney for Plaintiffs.

[Endorsed]: Filed Oct. 9, 1908. Southard Hoffman Clerk. By W. B. Maling, Deputy. [16]

At a stated term, to wit, the November term A. D. 1910, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Wednesday, the 7th day of December, in the year of our Lord one thousand nine hundred and ten: Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 14,615.

LOUIS ROSENFELD et al., etc.,

vs.

AUGUST E. MUENTER, etc.

**Order That Findings be Filed and Judgment
Entered in Favor of Plaintiffs.**

This cause came on this day for trial before the Court, sitting without a jury, Marshall B. Woodworth, Esq., appearing on behalf of the plaintiffs and George Clark, Esq., Assistant United States Attorney, appearing on behalf of the defendant. Evidence on behalf of the respective parties was introduced and closed and the cause was submitted to the Court for consideration and decision and the same being fully considered, it was ordered that findings be filed and judgment entered herein in favor of plaintiffs for the sum of \$3,912.90, with interest thereon and for costs. [17]

[Title of Court and Cause.]

Findings of Fact and Conclusions of Law.

This cause having been tried by the Court without a jury, a jury having been waived, the Court, after due consideration, makes the following Findings and Facts and Conclusions of Law:

I.

That the plaintiffs, Louis Rosenfeld and Henry Rosenfeld, were, and each of them was, at all of the times in the Complaint alleged, and now are, and each of them is, the duly appointed, qualified and acting trustees, under the trust declared by the last will and testament of John Rosenfeld, deceased.

II.

That at all the times in the Complaint alleged,

Henrietta Romer, Sarah Eppstein, Lucy Isabella Weill, Max. S. Rosenfeld, Louis Rosenfeld and Henry Rosenfeld were, and now are, beneficiaries under the trust declared by the last will and testament of John Rosenfeld, deceased.

III.

That at all of the times in the said Complaint alleged, Mrs. Margitta Fischer was a legatee under the last will and testament of John Rosenfeld, deceased, and that, in and by said last will and testament, said Mrs. Margitta Fischer was bequeathed the sum of \$20,000.

IV.

That John C. Lynch was the duly appointed, qualified and [18] acting Collector or Internal Revenue for the First Collection District of California, at all of the times mentioned in said Complaint, and up to October 1, 1907, at and from which time, August E. Muentner became the duly appointed, qualified and acting Collector of Internal Revenue for the First Collection District of California, and ever since has been, and now is such Collector of Internal Revenue, and was substituted as party defendant in the place and stead of John C. Lynch.

V.

That John Rosenfeld died on or about May 28, 1902, in the City of New York, being at the time of his death and for a long time previous thereto a resident of the City and County of San Francisco, State of California, and leaving a last will and testament, which was thereafter admitted to probate in accordance with proceedings taken under the laws

of the State of California, on or about June 15, 1902.

VI.

That according to the terms of said last will and testament, Louis Rosenfeld and Henry Rosenfeld were duly named and appointed the executors of said last will and testament of John Rosenfeld, deceased.

VII.

That on or about June 15, 1902, the said Superior Court duly made and entered its order admitting said last will and testament to probate and appointed said Louis Rosenfeld and Henry Rosenfeld executors thereof, who thereafter duly qualified and continued to act as executors until the close of the administration of said estate, to wit, on or about July 13, 1903. [19]

VIII.

That after proceedings regularly had and taken in said probate proceedings, by an order and judgment of said Superior Court, duly given and made on July 13, 1903, the property of said estate was, by final decree of distribution, distributed to Louis Rosenfeld and Henry Rosenfeld as trustees under the trust declared by said last will and testament and included in said property so distributed in trust to said Louis Rosenfeld and Henry Rosenfeld, as aforesaid was personal property, to be held in trust for the beneficiaries above named, and of the values set opposite their respective names, viz.:

Henrietta Romer, personal property of

the value of.....\$57,969.55

Sarah Eppstein, personal property of the

value of.....\$57,969.55

Lucy Isabella Weill, personal property of	
the value of.....	\$57,969.55
Max S. Rosenfeld, personal property of	
the value of.....	\$57,969.55
Louis Rosenfeld, personal property of the	
value of.....	\$57,969.55
Henry Rosenfeld, personal property of	
the value of.....	\$57,969.55

IX.

That the above stated values of the personal property to be held in trust, and which were held in trust, for the above-named beneficiaries, were the values as assessed on July 29, 1903, by said John C. Lynch, the then Collector of Internal Revenue.

X.

That said personal property, so to be held in trust for the above-named beneficiaries, of the values set opposite their respective names as above stated, was to be held and is now being held, under the terms of the last will and testament of said John Rosenfeld, in trust by said Louis Rosenfeld and Henry Rosenfeld as such trustees and the income thereon paid by said trustees to the said beneficiaries, in being provided in said last will and testament that the said trusts shall continue in existence for the period of eleven years after the [20] death of said testator, provided some one of his children and beneficiaries, therein named and herein above referred to should so long survive, otherwise the trusts should terminate upon the death of the last surviving of his said children and beneficiaries named in said last will and

testament and whose names are set out in paragraph VIII of this findings of facts.

XI.

That, under the terms of said last will and testament of said John Rosenfeld, deceased, said trusts will not expire until the 28th day of May, 1913, provided some one of his children therein named, and whose names are set out in paragraph VIII of this Findings of Facts shall so long survive.

XII.

That all of the said children of said John Rosenfeld, deceased, and the beneficiaries of the trusts provided for in his said last will and testament, whose names are set forth in paragraph VIII of this Findings of Facts, were living and surviving at the time of the repeal of the Act of Congress of June 13, 1898, as amended by the Act of March 2, 1901, to wit, on July 1, 1902, and now are and each of them is alive and surviving.

XIII.

That said incomes derived from said personal property and legacies above named of the values above set out to be held in trust as aforesaid for said beneficiaries above named, do not, nor does any one of them, amount to the sum of \$10,000 each year, or at all.

XIV.

That on July 29, 1903, said John C. Lynch, the then Collector of Internal Revenue for the First Collection District of California, acting under and by virtue of the provisions of the Act of Congress

of June 13, 1898, as amended by the [21] Act of Congress of March 2, 1901, and the rules and regulations of the United States Internal Revenue Department in such cases made and provided, assessed said Louis Rosenfeld and Henry Rosenfeld, the plaintiffs in this action, an Internal Revenue tax, aggregating the sum of \$4,062.90, said tax being assessed upon the legacies distributed to said Louis Rosenfeld and Henry Rosenfeld, in trust as above stated for the above-named beneficiaries as follows:

On the sum of \$20,000, the same being the share of the estate left to Mrs. Margitta Fischer, a sister of the testator, John Rosenfeld, deceased, the tax of \$150, being at the rate of 75 cents for every hundred dollars of said sum of \$20,000; on the further sum of \$57,969.55, the same being the share of the estate left to Henrietta Romer, a daughter of said testator, the tax of \$652.15, being at the rate of \$1.12½ for every hundred dollars of the said sum of \$57,969.55; on the further sum of \$57,969.55, the same being the share of the estate left to Sarah Eppstein, a daughter of said testator, a tax of \$652.15, being at the rate of \$1.12½ on every hundred dollars of the said sum of \$57,969.55; on the further sum of \$57,969.55, the same being the share of the estate left to Lucy Isabella Weill, a daughter of the testator, the tax \$652.15 being at the rate of \$1.12½ on every hundred dollars of said sum of \$57,969.55; on the further sum of \$57,969.55, the same being the share of the estate left to Max S. Rosenfeld, a son of the testator, the tax of \$652.15, being at the rate of \$1.12½ for every hundred dol-

lars of said sum of \$57,969.55; on the further sum of \$57,969.55, the same being the share of the estate left to Louis Rosenfeld, a son of the testator, the tax of \$652.15 being at the rate of \$1.12½ for every hundred dollars of said sum of \$57,969.55; on the further sum of \$57,969.55, the same being the share of the [22] estate left to Henry Rosenfeld, a son of the testator, the tax of \$652.15, being at the rate of \$1.12½ for every hundred dollars of said sum of \$57,969.55, aggregating the sum total, as above stated, of \$4,062.90.

XV.

That on July 29, 1903, Louis Rosenfeld and Henry Rosenfeld, trustees as aforesaid, paid to the then Collector of Internal Revenue for the First Collection District of California, the sum of \$4,062.90, which sum was paid by said Louis Rosenfeld and Henry Rosenfeld, as trustees, to the then Collector of Internal Revenue for and on behalf of the beneficiaries above named.

XVI.

That said assessment and payment of said tax \$4,062.90 as aforesaid were made under protest.

XVII.

That said John C. Lynch, the then Collector of Internal Revenue, and said Commissioner of Internal Revenue, and said August E. Muentner, the present defendant and successor in office of said John C. Lynch have at all times refused to refund said sum of \$4,062.90, or any part thereof, and that the whole and every part still remains unpaid and unrefunded.

From which foregoing Findings of Facts, I deduce and make and enter the following Conclusions of Law:

I.

That Louis Rosenfeld and Henry Rosenfeld are the proper parties plaintiff and have the legal capacity to institute and maintain this action:

II.

That the personal property and legacies distributed, under the terms of the last will and testament of John Rosenfeld, deceased, to said Louis Rosenfeld and Henry Rosenfeld in trust, and to be held in trust for the above-named children and beneficiaries [23] of said John Rosenfeld, deceased, were, and each of them was, contingent beneficial interests, which did not vest absolutely in possession or enjoyment, within the meaning of the Act of Congress of June 27, 1902, prior to the repeal of the Act of Congress of June 13, 1898, as amended by the Act of Congress of March 2, 1901, which took effect on July 1, 1902.

III.

That said taxes, so assessed, imposed and paid as aforesaid upon the several legacies as aforesaid, were, and each of them is, illegal and erroneous, and each of them was erroneously and illegally assessed, imposed and collected and without authority of law.

IV.

That the personal property and legacy distributed to Mrs. Margitta Fischer, under the terms of the last will and testament of John Rosenfeld, deceased,

was not to be held in trust for said Mrs. Margitta Fischer and was not a contingent, beneficial interest within the meaning of the Act of Congress of June 27, 1902, but the said personal property and legacy vested absolutely in possession or enjoyment previous to July 1, 1902, the date of the repeal of the Act of Congress on June 13, 1898, as amended by the Act of Congress March 2, 1901.

V.

That said plaintiffs, or either of them, as trustees, or at all, are not entitled to recover the sum of \$150, the same being the tax on the personal property and legacy of the clear value of \$20,000, bequeathed by the last will and testament of said John Rosenfeld, deceased, to Mrs. Margitta Fischer.

VI.

That the plaintiff recover judgment against the defendant, as Collector of Internal Revenue for the First Collection District of California, in the sum of \$3,912.90, being the [24] aggregate account of taxes assessed, imposed and paid as aforesaid upon the shares of the estate of John Rosenfeld, deceased, bequeathed in trust to Louis Rosenfeld and Henry Rosenfeld for and on behalf of the children and beneficiaries above named, to wit: Henrietta Romer, Sarah Eppstein, Lucy Isabella Weill, Max S. Rosenfeld, Louis Rosenfeld and Henry Rosenfeld, together with interest on said sum at the rate of seven per cent per annum from July 29, 1903, the same being the date when said taxes were paid to the then Collector of Internal Revenue, and with interest

from the date of said judgment and cost of suit as taxed.

Dated Jan. 18th, 1911.

WM. C. VAN FLEET,
Judge.

Approved.

GEO. CLARK,
Asst. U. S. Atty.

[Endorsed]: Filed Jan. 18, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [25]

[Title of Court and Cause.]

Judgment on Findings.

This cause having come on regularly for trial upon the 7th day of December, 1910, being a day in the November, 1910, term of said court, before the Court, sitting without a jury, a trial by jury having been duly waived by stipulation filed, Marshall B. Woodworth, Esq., having appeared as attorney for plaintiffs and George Clark, Esq., Assistant United States Attorney having appeared as attorney for the defendant, and the trial having been proceeded with upon the 7th day of December in said year and term, and oral and documentary evidence upon behalf of the respective parties having been introduced and the evidence having been closed and the cause having, after arguments by the attorneys for the respective parties been submitted to the Court for consideration and decision and the Court, after due deliberation having filed its findings in writing

and ordered that judgment be entered herein in accordance therewith and for costs:

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that Louis Rosenfeld and Henry Rosenfeld, as trustees under the last Will and Testament of John Rosenfeld, plaintiffs do have and recover of and from August E. Muentner, as Collector of Internal Revenue, for the First District of California, defendant, the sum of [26] Five Thousand Nine Hundred Fifty-eight and 80/100 (\$5,958.80) Dollars, together with their costs in this behalf expended taxed at \$ —.

Judgment entered January 18, 1911.

SOUTHARD HOFFMAN,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

A True Copy. Attest:

[Seal]

SOUTHARD HOFFMAN,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

[Endorsed]: Filed January 18, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. }[27]

[Title of Court and Cause.]

Certificate to Judgment-roll.

I, Southard Hoffman, Clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit,

Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court this 18th day of January, 1911.

[Seal]

SOUTHARD HOFFMAN,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

[Endorsed]: Filed January 18, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [28]

At a stated term, to wit, the March term, A. D. 1912, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 13th day of May, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 14,615.

LOUIS ROSENFELD et al.

vs.

AUGUST E. MUENTER,

Collector.

Order That Mandate be Spread upon the Minutes.

Upon motion of M. B. Woodworth, Esq., attorney for plaintiffs, it was ordered that the Mandate

of the United States Circuit Court of Appeals for the Ninth Circuit, herein, be filed and spread upon the minutes of this court, which said Mandate is in words and figures following, that is to say: [29]

Mandate of U. S. Circuit Court of Appeals.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable the Judges of the District Court of the United States for the Northern District of California, Second Division, Greeting:

[Seal U. S. Circuit Court of Appeals.]

WHEREAS, lately in the Circuit Court of the United States for the Northern District of California, before you, or some of you, in a cause between Louis Rosenfeld and Henry Rosenfeld, as Trustees Under the Last Will and Testament of John Rosenfeld, Plaintiffs, and August E. Muentner, Collector of Internal Revenue, Defendant, No. 14,615, a judgment was duly filed and entered on the 18th day of January, A. D. 1911, in favor of the said plaintiffs and against the said defendant; which said judgment is of record in the said cause in the office of the clerk of the said District Court (to which record reference is hereby made and the same is hereby expressly made a part hereof), as by the inspection of the Transcript of the Record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of a writ of error prosecuted by August E. Muentner, as Collector of the

Internal Revenue of the United States for the First Collection District of California as plaintiff in error against Louis Rosenfeld and Henry Rosenfeld, as Trustees Under the Last Will and Testament of John Rosenfeld as defendants in error agreeably to the Act of Congress in such cases made and provided, fully and at large appears:

AND WHEREAS, on the eighth day of November in the year of our Lord one thousand nine hundred and eleven the said cause came on to be heard before the said Circuit Court of Appeals, on the said Transcript of the Record and was duly submitted to the Court for consideration and decision on briefs:

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged [30] by this Court, that the judgment of the said Circuit Court in this cause be, and hereby is reversed, and that this cause be, and hereby is remanded to the District Court of the United States for the Northern District of California, Second Division, with leave to the parties to amend their pleadings and for further proceedings. (April 1, 1912.)

YOU, THEREFORE, ARE HEREBY COMMANDED That such further proceedings be had in the said cause in accordance with the opinion and judgment of this Court and as according to right and justice and the laws of the United States ought to be had, the said judgment of said Circuit Court notwithstanding.

Witness, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the

ninth day of May, in the year of our Lord one thousand nine hundred and twelve, and of the Independence of the United States of America the one hundred and thirty-sixth.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

[Endorsed]: No. 14,615. In the District Court of the United States, Northern District of California, Second Division. Louis Rosenfeld et al. vs. August E. Muenter, Collector, etc. Mandate of the United States Circuit Court of Appeals for the Ninth Circuit. Filed and Spread upon the Minutes of said District Court this 13th day of May, 1912. Jas. P. Brown, Clerk. By W. B. Maling, Deputy Clerk. [31]

[Title of Court and Cause.]

Amendment to Complaint.

Now come the plaintiffs above named and, leave of the Court having first been obtained, file this amendment to complaint:

They hereby amend paragraph VI of the Complaint heretofore filed herein, by eliminating the following words from the beginning of said paragraph contained in brackets, which words are as follows: "which estimate is for the purpose of this action acquiesced in by the plaintiff," and by so changing and modifying said paragraph VI as to make it read in the words and figures following, to wit:

VI.

"That the residuary personal property left by

said testator by the terms of said will as aforesaid, as estimated by said John C. Lynch, the then Collector of Internal Revenue as aforesaid, for the purpose of the Federal Succession Tax, amounted in value as follows, to wit:

The share of the estate left to Mrs. Margitta Fischer, a sister of John Rosenfeld, deceased, the sum of \$20,000;

The share of the estate left to Henrietta Romer, a daughter of said John Rosenfeld, deceased, the sum of \$57,969.55;

The share of the estate left to Sarah Eppstein, another daughter of said John Rosenfeld, deceased, the sum of \$57,969.55; [32]

The share of the estate left to Lucy Isabella Weill, another daughter of said John Rosenfeld, deceased, the sum of \$57,969.55;

The share of the estate left to Max S. Rosenfeld, a son of said John Rosenfeld, deceased, the sum of \$57,969.55;

The share of the estate left to Louis Rosenfeld, another son of said John Rosenfeld, deceased, the sum of \$57,969.55;

The share of the estate left to Henry Rosenfeld, another son of John Rosenfeld, deceased, the sum of \$57,969.55.

That said estimate and assessment of said residuary personal property left by said testator, as made as aforesaid by said John C. Lynch, the then collector of Internal Revenue as aforesaid, was and is excessive, erroneous and illegal and should have been estimated by said John C. Lynch, the then

Collector of Internal Revenue as aforesaid, as follows, to wit:

The share of the estate left to Henrietta Romer, a daughter of said John Rosenfeld, Deceased, the sum of \$20,313.62;

The share of the estate left to Sarah Eppstein, another daughter of said John Rosenfeld, deceased, the sum of \$20,313.62;

The share of the estate left to Lucy Isabella Weill, another daughter of said John Rosenfeld, deceased, the sum of \$20,313.62;

The share of the estate left to Max S. Rosenfeld, a son of said John Rosenfeld, deceased, the sum of \$20,313.62;

The share of the estate left to Louis Rosenfeld, another son of the said John Rosenfeld, deceased, the sum of \$20,313.62;

The share of the estate left to Henry Rosenfeld, another son of said John Rosenfeld, deceased, the sum of \$20,313.62.”

“That the taxes imposed by the said John C. Lynch, assuming to act as such Collector of Internal Revenues as aforesaid, based upon his assessment, as aforesaid, of the residuary personal property left by said testator, of the several legacies or shares [33] of estate left respectively to Henrietta Romer, Sarah Eppstein, Lucy Isabella Weill, Max S. Rosenfeld, Louis Rosenfeld, and Henry Rosenfeld, upon the sum of \$57,969.55 to each of said legatees, was and is excessive, erroneous and illegal, and that the taxes which should have been imposed by said Collector of Internal Revenue was and is

upon the estimate or assessment of \$20,313.62, that being the value of the legacy or share of estate which in law should have been estimated and assessed by said Collector of Internal Revenue, and upon which taxes should have been imposed by him in accordance with the law and regulations enacted in that regard."

WHEREFORE plaintiffs pray that this amendment be allowed and that these plaintiffs may have judgment upon their original complaint as thus amended and for their costs and interests.

MARSHALL B. WOODWORTH,
Attorney for Plaintiffs.

EDWARD LANDE,
Of Counsel.

Received copy of within amended complaint, Aug. 5, 1912.

JOHN L. McNAB,
U. S. Atty.
By E. H. PIER.

[Endorsed]: Filed Aug. 5, 1912. Jas. P. Brown,
Clerk. By J. A. Schaertzer, Deputy Clerk. [34].

[Title of Court and Cause.]

Answer to Complaint as Amended.

Now comes the defendant and answering plaintiffs' Complaint as amended on file herein, admits, denies and alleges as follows:

I.

Admits paragraph I of plaintiffs' Complaint as amended.

II.

Admits paragraph II of plaintiffs' Complaint as amended.

III.

Admits paragraph III of plaintiffs' Complaint as amended.

IV.

Admits the allegations of paragraph IV of plaintiffs' Complaint as amended.

V.

As to the allegations of paragraph V of plaintiffs' Complaint to the effect that Louis Rosenfeld and Henry Rosenfeld were at the time of the commencement of this action the duly appointed, qualified and acting executors of the last will and testament of John Rosenfeld, deceased, defendant alleges that he has no information or belief sufficient to enable him to answer the said allegations, and placing his answer upon said ground, he denies that the said plaintiffs were such executors or that either of them was an executor of said will at said time, either appointed, or qualified, [38] or acting.

VI.

In answering paragraph VI defendant admits that the residuary personal property left by said testator by the terms of said will as aforesaid, as estimated by said John C. Lynch, the then Collector of Internal Revenue as aforesaid, for the purpose of the Federal Succession Tax, amounted in value as follows, to wit:

The share of the estate left to Mrs. Margitta

Fischer, a sister of John Rosenfeld, deceased, the sum of \$20,000;

The share of the estate left to Henrietta Romer, a daughter of said John Rosenfeld, deceased, the sum of \$57,969.55;

The share of the estate left to Sarah Epstein, another daughter of said John Rosenfeld, deceased, the sum of \$57,969.55;

The share of the estate left to Lucy Isabella Weill, another daughter of said John Rosenfeld, deceased, the sum of \$57,969.55;

The share of the estate left to Max S. Rosenfeld, a son of said John Rosenfeld, deceased, the sum of \$57,969.55;

The share of the estate left to Louis Rosenfeld, another son of said John Rosenfeld, deceased, the sum of \$57,969.55;

The share of the estate left to Henry Rosenfeld, another son of said John Rosenfeld, deceased, the sum of \$57,969.55.

In further answer to said paragraph VI, defendant denies that said estimate and assessment or estimate or assessment of said residuary personal property left by said testator as made as aforesaid by said John C. Lynch, the then Collector of Internal Revenue as aforesaid, was and is or was or is excessive, erroneous and illegal or excessive, erroneous or illegal and should or should have been estimated by said John C. Lynch, the then Collector of Internal Revenue as set forth in said amendment to bill of complaint or should have been estimated otherwise than as the said John C. Lynch actually did es-

timate the value of said estate. [39]

And the said defendant further answering said paragraph VI of amendment to Bill of Complaint denies that the said John C. Lynch should have estimated the value of the estate left to Henrietta Romer at the sum of \$20,313.62 or in any other sum less than \$57,969.55.

And further answering said amendment to Bill of Complaint, defendant denies that the said John C. Lynch should have estimated the value of the estate left to Sarah Eppstein at the sum of \$20,313.62 or in any other sum less than \$57,969.55.

And further answering said amendment to Bill of Complaint, defendant denies that the said John C. Lynch should have estimated the value of the estate left to Lucy Isabella Weill at the sum of \$20,313.62 or in any other sum less than \$57,969.55.

And further answering said amendment to Bill of Complaint, defendant denies that the said John C. Lynch should have estimated the value of the estate left to Max S. Rosenfeld at the sum of \$20,313.62 or in any other sum less than \$57,969.55.

And further answering said amendment to Bill of Complaint, defendant denies that the said John C. Lynch should have estimated the value of the estate left to Louis Rosenfeld at the sum of \$20,313.62 or in any other sum less than \$57,969.55.

And further answering said amendment to Bill of Complaint, defendant denies that the said John C. Lynch should have estimated the value of the estate left to Henry Rosenfeld at the sum of \$20,313.62 or in any other sum less than \$57,969.55.

And defendant further denies in answer to paragraph VI of said amendment to Bill of Complaint that the taxes imposed [40] by the said John C. Lynch, assuming to act as such Collector of Internal Revenue, as aforesaid, or otherwise, based upon his assessment of the residuary personal property left by said testator of each of the several legacies or shares of the estate left respectively to Henrietta Romer, Sarah Eppstein, Lucy Isabella Weill, Max S. Rosenfeld, Louis Rosenfeld and Henry Rosenfeld upon the sum of \$57,969.55 to each of said legatees, was and is or was or is excessive, erroneous and illegal or excessive or erroneous or illegal.

And further answering said paragraph VI of amendment to Bill of Complaint, denies that the taxes which should have been imposed by said Collector of Internal Revenue was and is or was or is upon the assessment or estimate of \$20,313.62 or any other sum less than \$57,969.55 on each or any of the several legacies or shares of said estate left respectively to Sarah Eppstein, Henrietta Romer, Lucy Isabella Weill, Max S. Rosenfeld, Louis Rosenfeld and Henry Rosenfeld.

And further answering paragraph VI of said amendment to Bill of Complaint, defendant denies that \$20,313.62 or any other sum less than \$57,969.55 is the value of the legacy or share of the estate left to each of said Sarah Eppstein, Henrietta Romer, Lucy Isabella Weill, Max S. Rosenfeld, Louis Rosenfeld and Henry Rosenfeld which in law should have been estimated and assessed or estimated or assessed by said Collector of Internal Revenue or

upon which the taxes should have been imposed by him in accordance with law or the requirements enacted in that regard; and in this behalf alleges that the said John C. Lynch, then acting as Collector of Internal Revenue, should have assessed the said taxes as he actually did assess them as hereinbefore set forth.

VII.

In answer to paragraph VII of said Complaint defendant denies [41] that the said John C. Lynch, or that any officer under him in the service of the Internal Revenue Department of the United States, did collect the said taxes or any portion thereof by force and duress or by force or duress.

And further answering said paragraph of said Complaint as amended, defendant alleges that the taxes were voluntarily paid and that there was no force, actual or threatened, and no duress of any kind exercised by said defendant in either exacting, demanding or collecting the said tax.

VIII.

Defendant denies that said taxes were or that any portion thereof was paid under protest, either oral or in writing, or under any claim of any kind specifying that said taxes were unlawful or that there was no liability to pay the same or under any other claim of illegality whatsoever.

And further answering paragraph VIII, defendant denies that said sum of \$4,062.90 or any other sum so paid as set forth in said paragraph VIII of Complaint as amended, or that said sum was paid involuntarily and under protest or involuntarily or un-

der protest or protesting that they were not as such executors nor was the estate represented by them nor were said legacies liable to pay said tax.

IX.

As to the allegations of the said Complaint to the effect that the plaintiffs are the owners of the alleged cause of action set forth in plaintiffs' Complaint, defendant alleges that he has no information or belief sufficient to enable him to answer the said allegations, and placing his answer upon that ground, he denies that the plaintiffs own or have any interest, or either owns or has any interest in the alleged cause of action set forth in plaintiffs' Complaint; and upon the same [42] ground the defendant denies that the plaintiffs are or that either of them is trustee of the said estate.

X.

Plaintiff admits the allegations contained in paragraph X of said Complaint and further alleges that the only ground upon which a refunding of said tax of \$4,062.90 was made to the Collector of Internal Revenue for the First District of California and upon which an appeal to the Commissioner of Internal Revenue was based was the ground set forth in said paragraph X of said Complaint.

XI.

Admits that no part of said taxes paid as herein admitted has ever been repaid by the defendant or the United States of America.

WHEREFORE, defendant prays that plaintiff take nothing by this action and for costs of suit.

JOHN L. McNAB,
United States Attorney,
Attorney for Defendant.

Verification waived.

MARSHALL B. WOODWORTH,
Atty. for Plaintiff.

Received copy of within answer to complaint as amended this —— day of May, 1913.

MARSHALL B. WOODWORTH,
Atty. for Plaintiff.

May 8/13.

[Endorsed]: Filed May 8. 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [43]

At a stated term, to wit, the July term, A. D. 1913,
of the District Court of the United States of
America, in and for the Northern District of
California, Second Division, held at the court-
room in the City and County of San Francisco,
on Monday, the 22d day of September, in the
year of our Lord one thousand nine hundred
and thirteen. Present: The Honorable WILL-
IAM C. VAN FLEET, District Judge.

No. 14,615.

LOUIS ROSENFELD and HENRY ROSENFELD, as Trustee Under the Last Will and Testament of John Rosenfeld,
Plaintiffs,

vs.

AUGUST E. MUENTER, Collector of Internal Revenue,
Defendant.

Order of Substitution of Defendant.

It appearing that this suit was brought against John C. Lynch, as Collector of Internal Revenue for the First Collection District of California, and it further appearing that the subject matter of said suit relates to the official liability of said John C. Lynch, as such Collector of Internal Revenue, and it further appearing that after the filing of said suit the said John C. Lynch resigned on October 1, 1907, as such Collector of Internal Revenue, and that his resignation was duly accepted to take effect on October 1, 1907, and that August E. Muentner was appointed Collector of Internal Revenue in the place and stead of said John C. Lynch, and that said August E. Muentner duly qualified as such Collector of Internal Revenue on October 1, 1907, and continued to be the duly appointed, qualified and acting Collector of Internal Revenue from October 1, 1907, to September 1st, 1913, [44] upon which date *John J. Scott*, having been previously appointed

Collector of Internal Revenue in the place and stead of said August E. Muentner, duly qualified as such Collector of Internal Revenue, and now is, and ever since has been duly appointed, qualified and acting Collector of Internal Revenue for the First Collection District of California;

IT IS NOW HERE ORDERED, that Joseph J. Scott be substituted as defendant in the place and stead of August E. Muentner, and that said suit be hereafter entitled and maintained against said Joseph J. Scott, as Collector of Internal Revenue.
[45]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 14,615.

LOUIS ROSENFELD and HENRY ROSENFELD, as Trustees Under the Last Will and Testament of John Rosenfeld,
Plaintiffs,

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue,
Defendant.

Judgment.

This cause having come on regularly for trial upon the 7th day of April, 1914, being a day in the March, 1914, term of said court, before the Court, sitting without a jury, a trial by jury having been specially waived by stipulation filed, Marshall B.

Woodworth, Esq., appearing as attorney for plaintiffs, Earl H. Pier and M. A. Thomas, Esqrs., appearing as attorneys for defendant; and the trial having been proceeded with and oral and documentary evidence upon behalf of the respective parties having been introduced and the evidence having been closed and the cause having been submitted without arguments upon briefs filed, and the Court, after due deliberation, having filed its opinion and ordered that judgment be entered herein in favor of plaintiffs and against defendant in the sum of \$1,432.19, together with interest thereon at 7% per annum from July 29, 1903, to May 8, 1916, and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Louis Rosenfeld and Henry Rosenfeld, as trustees under the last will and testament of John Rosenfeld, plaintiffs, do have and recover of and from Joseph J. Scott, Collector of Internal Revenue, defendant, the sum of Two Thousand Seven Hundred Twelve and 93/100 [46] (\$2,712.93) Dollars, together with their costs in this behalf expended, taxed at \$60.60.

Judgment entered May 8, 1916.

WALTER B. MALING,

Clerk.

A True Copy. Attest:

[Seal]

WALTER B. MALING,

Clerk.

[Endorsed]: Filed May 8, 1916. Walter B. Mal-
ing, Clerk. [47]

[Title of Court and Cause.]

Certificate to Judgment-roll.

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Attest my hand and the seal of said District Court, this 8th day of May, 1916.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

[Endorsed]: Filed May 8, 1916. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[48]

[Title of Court and Cause.]

Engrossed Bill of Exceptions.

Be it remembered that on April 7th, 1914, the above-entitled cause came on for trial before the Court sitting without a jury, a trial by jury having been waived in writing by counsel for the respective parties, and thereupon the following proceedings took place, Mr. Marshall B. Woodworth, appearing for the plaintiffs, and Mr. Earl H. Pier, Assistant United States Attorney, appearing for the defendant.

Mr. Marshall B. Woodworth made an opening statement to the Court on behalf of the plaintiffs,

and thereupon the following proceedings were had and evidence and testimony, oral and documentary, were introduced in evidence on behalf of the plaintiffs and on behalf of the defendant, as follows:

Testimony of Henry Rosenfeld, for Plaintiffs.

HENRY ROSENFELD, called as a witness on behalf of the plaintiffs, being first duly sworn, testified:

My name is Henry Rosenfeld. I reside in San Francisco. I knew John Rosenfeld during his lifetime. He [53] was my father. He died on May 28, 1902. He left five other children other than myself. He left six children, varying in age from about—Mrs. Rosner was at that time about 40, Mrs. Epstein, about 38; Louis Rosenfeld, about 37; Henry Rosenfeld, 35; Lucy Weill, about 32; Max Rosenfeld, about 27. My father left real and personal property at the time of his death. He left a last will and testament, which was presented for probate in the Superior Court of the City and County of San Francisco, State of California. The records in the probate proceedings were destroyed in the fire of April, 1906. They were all restored later.

Thereupon there was admitted in evidence, without objection, a certified copy of the petition to establish record, notice of application to restore record, proof of posting on application to restore record, and order establishing record, in the Matter of the Estate of John Rosenfeld, deceased, No. 1624, New Series, Department No. 9 of the Superior Court of the State of California, in and for the City and

(Testimony of Henry Rosenfeld.)

County of San Francisco, which certified copy of documents contained the last will and testament of John Rosenfeld, deceased, and other documents relating to the probate of his will, which documents were marked "Plaintiffs' Exhibit No. 1."

(Witness continuing:) Louis Rosenfeld and Henry Rosenfeld were named as executors in that will. The same parties were named as trustees under the terms of the trust created by the will. We were discharged as executors and assumed our duties as trustees in June, 1903. In June, 1903, we became the trustees, myself and my brother Louis. We are still the duly appointed, qualified and acting trustees of that trust. We [54] have never been discharged. I remember paying a tax to the Collector of Internal Revenue on the property passing under the will and covered by that trust. I consulted my attorneys after receiving a notice that we were indebted to the sum of \$652.15 as a tax on each legacy, which notice required us to pay it or be subject to a penalty. My attorneys advised me—Mr. W. S. Goodfellow was my attorney at the time. He advised me that I would have to pay the tax but I would have to protest it with the Collector at the time I paid it. I did—on July 29, 1903—protested at the time I made the payment to Mr. Thomas, the Deputy Collector. I paid this tax on July 29, 1903. At the time I paid this tax I was directed to make out and file what is known as a legacy return and schedules attached thereto. That is the paper. (Examining legacy return.)

(Testimony of Henry Rosenfeld.)

(Said paper was introduced and offered in evidence and marked Plaintiffs' Exhibit No. 3 on Retrial.)

I paid the money. The protest was a verbal one. I afterwards asked for a return of the tax. No return was made of the tax or of any portion thereof.

On cross-examination, the witness Henry Rosenfeld, testified as follows:

I did not file a written protest. (To the Court:) I made a demand afterwards. The demand was in writing. (To Mr. Pier:) I did not make it personally. I was not present at the time the demand was made. I was present at the time the first protest was made. I made that myself. I will have to ascertain the dates of the birth of each of my brothers and sisters. I have only given the dates approximately.

Mr. WOODWORTH.—I would suggest that Mr. Rosenfeld be permitted to prepare a list of the dates of the births [55] of his brothers and sisters some time this afternoon after he leaves the stand and present it to the Clerk or Reporter.

Mr. PIER.—Under the terms of this will the interest which each of these children took being a life interest in the estate it will be necessary to determine the life interest which each took under the will by ascertaining their ages—

Mr WOODWORTH.—That is where counsel and I differ. The term of the trust was eleven years and it ended absolutely at the end of that period.

(Testimony of Henry Rosenfeld.)

Mr. PIER.—The situation is this, your Honor. The property was held in trust for eleven years, at the end of the eleven years to be distributed among the six children. That would constitute, at least the amount of the estate which they took under the will would be, a life interest in a sixth of the estate of each of them, and therefore the Government is entitled to a tax on the sixth interest of each of them in the estate. That is the position of the Government at this time.

The COURT.—That is a matter for future consideration. You can proceed and ascertain the ages.

Mr. PIER.—You will give me a list of the dates of the births of your brothers and sisters?

Mr. WOODWORTH.—Mr. Rosenfeld, you can make a list of the ages of your brothers and sisters and give it to the United States Attorney this afternoon—

The COURT.—And the dates of their births.

Mr. PIER.—XQ. You are Henry Rosenfeld?

A. Yes, sir.

XQ. What is the date of your birth?

A. 1865.

XQ. And the day of the month?

A. June 22d.

Mr. WOODWORTH.—There is a place for the ages in [56] this legacy return but it is not filled in at all, the Government officers evidently considering the ages of the legatees as not being of any importance.

(Testimony of Henry Rosenfeld.)

Mr. PIER.—That is all, excepting, of course, there is the understanding that you are to furnish us with the dates of births of your brothers and sisters.

Testimony of Frank H. Driscoll, for Plaintiffs.

Thereupon FRANK H. DRISCOLL was called as a witness on behalf of the plaintiffs, and, being first duly sworn, testified:

I reside at 5130 Congress Avenue, Oakland, California. I am Special Gauger of the Internal Revenue Department. I have been connected with the United States Government 19½ years at San Francisco. I am familiar as such officer with the Internal Revenue Department of the Government especially as to the assessment, imposition and collection of taxes on legacies during the Spanish-American War. I was such officer at the time covered here by this complaint—in 1903. As such officer I had official duties to perform in regards to the assessment of taxes on these legacies, but not to the collection. My superior attended to the collection of the taxes. The Commissioner of Internal Revenue has promulgated an official mortuary table. The book handed me, called *Compilation of Decisions rendered by the Commissioner of Internal Revenue under the War Revenue Act of June 13, 1898*, edition of January, 1899, printed in the Government Printing Office at Washington, and especially pages 195 to 199 contained the official Mortuary table or list. It is the order of the Commissioner of Internal Revenue which affords us a basis

(Testimony of Frank H. Driscoll.)

of calculations with reference to the assessment of taxes on legacies.

Thereupon the book was introduced and admitted in evidence, especially pages 195 to 199, and marked "Plaintiffs' [57] Exhibit No. 2."

Mr. WOODWORTH.—Q. I will hand you this mortuary table, Mr. Driscoll, and ask you, using the language of the Circuit Court of Appeals, what would be the tax on the value of the right to receive the annual income from the sum of \$57,969.55 for the period of eleven years?

Mr. PIER.—I object to that question, if your Honor please, on the ground that it is incompetent, irrelevant and immaterial, and on the further ground that the interests that passed to the children under this will were life interests and not interests for a term of years.

Mr. WOODWORTH.—Well, of course, the will speaks for itself.

The COURT.—I will take it subject to the objection. You may answer the question.

A. The tax due the Government would be \$252.35.

Mr. PIER.—I object to the question on the ground that it calls for the conclusion of the witness, and further on the ground that it implies what is not the fact—

The COURT.—A question containing an assumption?

Mr. PIER.—Yes; that is, as to the amount of the tax on the value of the interests passing to the children. I make that further objection to that ques-

(Testimony of Frank H. Driscoll.)

tion. As the law fixes the amount of the tax it will be for the Court to determine the amount in this case. It will be for the witness to determine the value of the interests passing, but not as to the amount of the tax.

The COURT.—Of course that is a mere mathematical calculation, but I think that the objection is good, and I should suggest that the witness state the value of the interests passing. I will sustain the objection. [58]

Mr. WOODWORTH.—Q. Mr. Driscoll, will you state to his Honor what would be the value of the right to receive the annual income from this \$57,969.55; in other words, what sum would you tax as a Government officer? A. \$20,313.62.

Q. That would be as to each legacy?

A. Yes, each of the six.

Q. And what is the rate of tax?

A. 75/100 of 1%; 75¢ on each \$100.

The COURT.—Q. The amount you say, would be \$20,313.62? A. Yes, sir.

On cross-examination, the witness Frank H. Driscoll testified as follows:

(By Mr. PIER.)

XQ. Mr. Driscoll, you are basing your valuation of the interests passing to each of these legatees upon the assumption that they only get the income for eleven years. Is not that true?

A. It is an annuity; yes.

XQ. An annuity for eleven years? A. Yes.

(Testimony of Frank H. Driscoll.)

XQ. What would be the value of a life estate in a right to receive the income from \$57,060.55 passing to a person forty years of age?

Mr. WOODWORTH.—We object to that question as incompetent, irrelevant and immaterial, and not within any of the issues involved here.

The COURT.—I will take it subject to the objection.

A. I would have to make my calculations. I haven't made them on that basis.

Mr. WOODWORTH.—We make further objection, if your Honor please, that the question assumes that this sum did not vest previous to the repeal of the law. [59]

The COURT.—He is not asking him that. He is asking what would be the value of a life estate in a right to receive the income from that sum to a person forty years of age.

Mr. PIER.—Mr. Driscoll not having made these computations, and Mr. Rosenfeld not having given the dates of the births of his brothers and sisters, may we have the dates of the births given later to Mr. Driscoll by Mr. Rosenfeld so that he can make the computations?

The COURT.—Yes, as you haven't all the evidence here you will abide by the statement of Mr. Rosenfeld as to the dates of the births, and Mr. Driscoll can make his computations. You had better have Mr. Rosenfeld furnish those to him and then hand them in and have them introduced in evidence.

(Testimony of Frank H. Driscoll.)

At the conclusion of the testimony of witness F. H. Driscoll, the following proceedings took place:

Mr PIER.—If your Honor please, I move to strike out the testimony of the witness Driscoll entirely upon the ground that his testimony is incompetent, irrelevant and immaterial, and that the theory upon which the claim was presented to the Collector of Internal Revenue, and which I contend must be followed in a suit to collect the tax, has not been followed in this matter, and that the present suit is based upon a different theory from that set forth in his claim for a refund. A claim for a refund must be made under sections 3228, 3229 and 3230, I believe, of the Revised Statutes. Those sections set out a prescribed method by which a claim for a refund must be made. In that claim for a refund they must set forth the ground upon which they claim a refund. The grounds upon which they claimed a [60] refund were those specified in Paragraph X of the Complaint. Such being the grounds upon which they claimed a refund before the Collector of Internal Revenue, they cannot now come before the Court, I contend, and ask for a refund on any other theory than that on which they claimed a refund before the Collector of Internal Revenue. That being our position, the testimony of Mr. Driscoll as to a valuation of the estate, or a portion of the estate, in other words, testimony to show an excessive valuation of the estate, which was not raised before the Collector, is immaterial at this time.

(Testimony of Frank H. Driscoll.)

The COURT.—Hasn't the Supreme Court virtually held that a demand for the return of this tax isn't necessary?

Mr. WOODWORTH.—Yes, your Honor.

Mr. PIER.—No, the Court has not held that. Mr. Woodworth refers to an opinion of the Attorney General in which he was considering a case of recovering a tax upon a contingent interest. This is a tax upon a vested interest, and it is claimed that the tax was based upon an excessive valuation, and not having raised the point before the Collector they are not entitled to make a claim for it now.

The COURT.—I see your point.

Mr. WOODWORTH.—It is unfortunate that every time counsel has raised that point the Court has ruled against him.

The COURT.—Hasn't the Circuit Court of Appeals ever decided it?

Mr. PIER.—No. They said that the value was too small to be taken into consideration. The question has never been decided by the Circuit Court of Appeals. They have merely mentioned the question whether the valuation was [61] excessive and passed it without determination.

Mr. WOODWORTH.—On the petition for a rehearing in *Muenter vs. Frederick* that was practically the only point made by the gentleman in a brief of about fifteen pages, to which I replied. The petition for a rehearing was denied. I will hand that to your Honor. In his brief on the petition for a rehearing in *Muenter vs. Bliss*, he elaborated upon

(Testimony of Frank H. Driscoll.)

the point that these claims are governed by Section 3228, and inasmuch as the claim was not couched in certain language we could not recover anything, and the Circuit Court of Appeals, after careful consideration, decided against him.

The COURT.—What did they decide?

Mr. WOODWORTH.—They denied it. The petitions for rehearing were both denied. The case of Muentner vs. Bliss was decided in favor of the plaintiffs. The Attorney General has said that the refunding of money paid as taxes under the War Revenue Act is an act of bounty on the part of the Government, irrespective of any claim for a refund, and this matter was briefed and argued before the Court in Muentner vs. Friedrich.

The COURT.—I will reserve a ruling on the question at this time, and, you having made the objection, if I determine that the evidence is incompetent it simply will not be considered.

Thereafter Henry Rosenfeld delivered the following memorandum to the Reporter: "Ages of beneficiaries, according to Will: Daughter Henrietta Rossner, born May 4, 1860; daughter Sarah Epstein, born June 2, 1861; son Louis Rosenfeld, born June 16, 1863; son Henry Rosenfeld, born June 22, 1865; daughter Lucy I. Weill, born August [62] 16, 1869, son Max L. Rosenfeld, born May 8, 1873."

And thereafter Frank H. Driscoll delivered the following memorandum to the Reporter:

(Testimony of Frank H. Driscoll.)

“San Francisco, Cal., April 8, 1914.

“The Honorable the United States District Court,
San Francisco, California.

“Sir: The following data, the result of computation of the life interests of the principal legatees of the estate of John Rosenfeld, deceased, May 28, 1902, in income from the sum of \$57,969.55, at 4%, \$2,318.782, are submitted:

To Henrietta Rosener, daughter, born May 4, 1860; age 42 years; amount taxable, \$33,903.42; rate, \$1.12½ tax.....	\$381.41
To Sarah Epstein, daughter; born June 2, 1861; age 40 yrs; amount taxable, \$34,997.25; rate, \$1.12½ tax.....	393.72
To Louis Rosenfeld, son; born June 16, 1863; age 38 yrs; amount taxable \$36,020.45; rate \$1.12½; tax.....	405.23
To Henry Rosenfeld, son; born June 22, 1865, age 36 yrs; amount taxable, \$36,978.89, \$1.12½; tax	416.01
To Lucy I. Weill, daughter, born August 16, 1869; age 32 yrs; amount taxable, \$38,720.09, \$1.12½; tax	435.60
To Max L. Rosenfeld, son; born May 8, 1873; age 29 yrs; amount taxable \$39,882.27; rate \$1.12½; tax	448.74

Total Tax.....\$2,480.71

“In computing the foregoing the annuity or present value of one dollar due at the end of each

(Testimony of Frank H. Driscoll.)

year during the life of a person of specified age was, as to each, as follows:

“Henrietta Rosner, 42 yrs., \$14,621.22; Sarah Epstein, 40 yrs., \$15,092.95; Louis Rosenfeld, 38 yrs., \$15,534.21; Henry Rosenfeld, 36 yrs., \$15,947.55; Lucy I. Weill, 32 yrs., \$16,698.46; Max L. Rosenfeld, 29 yrs., \$17,202.25. [63]

“Respectfully submitted,
F. H. DRISCOLL.”

Thereupon the plaintiffs rested their case.

The defendant thereupon rested, and the case was submitted for decision.

Thereafter, on May 8, 1916, the Court, having duly considered said cause, rendered its written decision in words and figures following, to wit: [64]

[Title of Court and Cause.]

Opinion.

MARSHALL B. WOODWORTH, of San Francisco, for Plaintiffs.

JOHN W. PRESTON, U. S. Attorney, and
ANNETTE ABBOTT ADAMS, Asst.
U. S. Attorney, of San Francisco, for Defendant.

VAN FLEET, District Judge:

On the former trial, this court held that the interests upon which the tax was assessed and collected were entirely contingent, beneficial interests, not vested in possession and enjoyment, and hence, under the doctrine of *Vanderbilt v. Eidman*, 196 U. S. 480, and other cases following it, were not sub-

ject to tax under the War Revenue Act, and that the tax was illegal and void. Judgment was accordingly given for the recovery of the entire tax. The Circuit Court of Appeals, while sustaining the view of this court that the *corpus* of the legacies under the will of John Rosenfeld had not vested at the time of assessment, and were not subject to the tax in gross, held, that under the principles announced in the later case of *U. S. v. Fidelity Trust Co.*, 222 U. S. 158 (decided pending the appeal), the [65] rights given the beneficiaries by the will to receive the income of the legacies "were rights which were vested at the time of the assessments which were made thereon and were subject to the War Revenue tax, and assessable, not upon the gross amount of the legacy, but upon the value of the rights to receive the annual income"; and the case was accordingly remanded for further proceedings, with a right in the plaintiffs to amend their complaint accordingly.

Having amended their pleading to conform to the changed aspects of the case and meet the views of the Court of Appeals, the plaintiffs at the present trial have proceeded on the same theory as at the first, that their right of recovery remains under section 3 of the Refunding Act of June 27, 1902, and made their case accordingly. That section provides:

"That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the act approved June 13, 1898, entitled 'An Act to Provide Ways and Means to Meet

War Expenditures, and for Other Purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests, which shall not have become vested prior to July first, nineteen hundred and two.'"

The defendant strenuously contends that the theory upon which plaintiffs have proceeded is erroneous; that, under the decision of the Circuit Court of Appeals, that section furnishes no basis for recovery; that the Court, having held that, to the extent of the annual income, the rights given plaintiffs under the will were vested rights, it results that the tax collected must be regarded as one involving a mere overvaluation of such vested interests, and [66] that the right of the plaintiffs to recover, if at all, is governed by the provisions of sections 3226, 3227 and 3228 of the Revised Statutes, to the requirements of which the plaintiffs' proofs have not conformed.

But I am of the opinion that this contention involves a misapprehension of the remedial scope of section 3 and a failure to fully appreciate what the Refunding Act was intended to accomplish. Its evident purpose was, as an act of justice by the Govern-

ment, to provide a means to restore to the citizens moneys to which the Government was not entitled, but which he had been required to pay, by reason of a misconstruction by the revenue officers of the provisions of the War Revenue Act, and as to the recovery of which the existing statutes afforded no adequate remedy; and that it was intended to cover all instances where, as a result of the administration of that Act, taxes had been to any extent illegally or unjustly assessed and collected is, I think, from its comprehensive language, quite obvious. By its very terms it contemplates that the tax may have been to some extent properly assessed, as being based upon a vested interest, and hence the provision that only to the extent that it exceeds such basis shall be refunded; that is, "*so much* of said tax as may have been collected on contingent, beneficial interests which shall not have become vested." The present case falls clearly within the scope of the Act. It matters not whether we say the assessment was erroneous because an overvaluation of vested interests, or because one made wholly upon interests which had not vested. Either is within the wrong Congress intended to redress, and both are equally within the remedial provision of the statute. Nor does the decision of the [67] Circuit Court of Appeals operate to take the case out of the provisions of this Act. That Court clearly indicates by its opinion that, while the tax as assessed was in part based upon vested rights subject to the Revenue Act, it covered interests which were not so vested,

and that, as to such excess, plaintiffs should be entitled in this action to recover.

This construction is in harmony with that of the Department of Justice. In his opinion rendered to the Secretary of the Treasury for his guidance as to the scope and purpose of the Act of June 27, 1902, the learned Attorney General says:

“The provisions of the Act are special, and apply to a particular class of obligations against the Government. Being special, these claims are not governed by the provisions of the prior general statute. (R. S., sec. 3228.) Suits brought to recover money due under this Act are not actions for the recovery of taxes, but for money held by the Government in trust for the benefit of the parties to whom it rightfully belongs. The Act by its terms, creates and acknowledges the obligation of the Government. A method is prescribed by which each party can secure the money belonging to him whenever he wishes it. No time has been fixed by any rule of the Secretary of the Treasury, which has been called to my attention, within which a claimant must apply for it, or after which the money is forfeited to the Government. It is, therefore, an obligation payable on demand, and the statute of limitations does not begin to run until there has been a refusal to pay, or something equivalent thereto. (U. S. vs. Wardell, 172 U. S. 48.)

“It will be observed that under the provisions of this statute Congress has granted a right of

repayment regardless of any conditions that may have heretofore operated as a bar to such repayment. The statute is an acknowledgment by Congress of a supposed moral obligation; a provision as a bounty of the Government. Whether or not the taxes were originally paid under protest is eliminated, and the question of voluntary or involuntary payment is immaterial."

Op. Atty. Genl., Vol. 26, p. 194.

See, also, *Thatcher vs. U. S.*, 149 Fed. 902.

The question as to the extent of the vested interests [68] remains. The will of Rosenfeld creating a trust to continue for eleven years, during which period the beneficiaries were to receive the annual income, and at its expiration the principal of *corpus* of their respective legacies, plaintiffs contend that, under these provisions, the vested right of each subject to the tax was on the income for the definite term of eleven years; defendant, on the other hand, contending that the vested interests of each was to the income for life, since necessarily, under the terms of the will, the beneficiaries would have and enjoy the income not only during the trust, but thereafter during their lives. The latter is, I think, the correct construction. It is not a case where, at the termination of the trust period, the right to receive the income might, on the happening of some contingency, pass to some one other than the beneficiary, but where, by the vesting of the *corpus* of the legacy at the termination of that period the right to the income would still remain for life.

The total tax assessed and collected on the gross amount of the legacies given by the will was \$4,062.90, which included a tax of \$150 on a legacy to Margitta Fisher, not here in controversy. The tax on the legacies here in question was, therefore, \$3,912.90. The evidence shows that the tax properly assessable on the rights of these beneficiaries was \$2,480.71. The excess tax is thus represented by the difference between the latter sum and the sum of \$3,912.90 actually collected, or \$1,432.19, for which latter sum the plaintiffs are entitled to judgment, with interest at the legal rate from the date of payment, and for their costs.

Let judgment be entered accordingly. [69]

Thereupon the Court allowed to each of said parties the benefit of any and all exceptions to the various rulings of the Court in admitting and rejecting evidence and in its decision upon the facts and law of the case.

The above bill of exceptions contains all of the evidence, oral and documentary, and all of the proceedings relating to the trial of the above-entitled case.

It is hereby stipulated and agreed by and between the attorneys for the respective parties that all exhibits introduced upon the trial of the above-entitled cause and now in the custody of the clerk of the court shall be deemed to be included as part of the foregoing bill of exceptions with the same effect in all respects as if incorporated in said bill of exceptions.

Dated June 2d, 1916.

MARSHALL B. WOODWORTH,
Attorney for Plaintiffs.

JNO. W. PRESTON,
Attorney for Defendant. [70]

It is hereby stipulated and agreed by and between the attorneys for the plaintiff and for the defendant that the foregoing Bill of Exceptions has been presented in time, and that it be approved, allowed and settled by the Judge of the above-entitled court as correct in all respects, and that the same shall be made a part of the record in said case and be the Bill of Exceptions therein, and that said Bill of Exceptions may be used by either parties plaintiff or defendant upon any writ of error sued out by either parties plaintiff or defendant.

Dated June 2, 1916.

MARSHALL B. WOODWORTH,
Attorney for Plaintiffs.

JNO. W. PRESTON,
Attorney of Defendant.

Order Approving and Settling Bill of Exceptions.

The foregoing Bill of Exceptions, duly proposed and agreed upon by the counsel for the respective parties, is correct in all respects, and is hereby approved, allowed and settled and made a part of the record herein and said Bill of Exceptions may be used by either parties plaintiff or defendant upon any writ of error sued out by either parties plaintiff or defendant.

Dated June 2d, 1916.

WM. C. VAN FLEET,
U. S. District Judge.

[Endorsed]: Filed Jun. 7, 1916. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [71]

[Title of Court and Cause.]

Assignment of Errors.

Now come the plaintiffs in the above-entitled action, by Marshall B. Woodworth, Esq., their attorney, and specify the following as the errors upon which they will rely and which they will urge upon their Writ of Error in the above-entitled action, to wit:

I.

The Court erred in rendering judgment in favor of the plaintiffs in the sum only of \$1,432.19, with interest at the legal rate from the date of payment and for their costs instead of the sum of \$2,998.80, with interest and costs, that being the amount prayed for in the amended complaint.

II.

The Court erred in not rendering judgment in favor of the plaintiffs and against the defendant in the sum of \$2,998.80, with interests and costs.

III.

The Court erred in holding that the annual income to be taxed upon the legacies left in trust by the last will and testament of John Rosenfeld, deceased, to Henrietta Rosner a daughter, to Sarah Epstein, a daughter, to Lucy I. Weill, a daughter, to Max S.

Rosenfeld, a son, to Louis Rosenfeld, a son, to Henry [74] Rosenfeld, a son, was an annual income for the lives of said beneficiaries, and was not an annual income for the period of eleven years, at the end of which eleven years the trust provided by the last will and testament of John Rosenfeld, deceased, was to terminate.

IV.

The Court erred in not holding that the annual income to be taxed upon the legacies left in trust by the last will and testament of John Rosenfeld, deceased, to Henrietta Rosner, a daughter, to Sarah Epstein, a daughter, to Lucy I. Weill, a daughter, to Max S. Rosenfeld, a son, to Louis Rosenfeld, a son, to Henry Rosenfeld, a son, was an annual income only for the period of eleven years, that being the period, duration and length of the trust provided for by the last will and testament of John Rosenfeld, deceased.

V.

The Court erred in not holding that the annual income to be taxed upon the legacies left in trust by the last will and testament of John Rosenfeld, deceased, for the period of eleven years was the equivalent of an annuity for the period of eleven years and not the equivalent of a life estate, as held by the Court.

VI.

The Court erred in holding that the annual income to be taxed upon the legacies left in trust by the last will and testament of John Rosenfeld, for the period of eleven years was in effect the same as the annual

income for the lives of the respective beneficiaries, and that taxes should be imposed on said annual income during the lives of said beneficiaries instead of the period of eleven years, the period provided for as the duration of the trust by the last will and testament of John Rosenfeld, deceased.

VII.

That the Court erred in not following and adopting the [75] official course pursued by the Internal Revenue officers of the United States in assessing and computing the taxes upon the legacies left in trust by the last will and testament of John Rosenfeld, deceased, as an annuity for eleven years, or as the right to receive the annual income from the legacies left in trust in the sum of \$57,969.55 to each of said beneficiaries for the term of eleven years, as testified to by Frank H. Driscoll, Internal Revenue officer of the United States, upon the trial of said cause.

VIII.

The Court erred in refusing to permit the following question to be asked of the witness Frank H. Driscoll and in sustaining the objection interposed by the attorney for the defendant to said question, as follows:

“Mr. WOODWORTH.—Q. I will hand you this mortuary table, Mr. Driscoll, and ask you, using the language of the Circuit Court of Appeals, what would be the tax on the value of the right to receive the annual income from the sum of \$57,969.55 for the period of eleven years?

Mr. PIER.—I object to that question, if your

Honor please, on the ground that it is incompetent, irrelevant and immaterial and on the further ground that the interests that passed to the children under this will were life interests and not interests for a term of years.

Mr. WOODWORTH.—Well, of course, the will speaks for itself.

The COURT.—I will take it subject to the objection. You may answer the question.

A. The tax due the Government would be \$252.35.

Mr. PIER.—I object to that question on the ground that it calls for the conclusion of the witness, and further on the ground that it implies what is not the fact— [76]

The COURT.—A question containing an assumption?

Mr. PIER.— Yes; that is, as to the amount of the tax on the value of the interests passing to the children. I make that further objection to that question. As the law fixes the amount of the tax it will be for the Court to determine the amount in this case. It will be for the witness to determine the value of the interests passing, but not as to the amount of the tax.

The COURT.—Of course that is a mere mathematical calculation, but I think that the objection is good, and I should suggest that the witness state the value of the interests passing. I will sustain the objection," to which ruling the Court duly and regularly allowed an exception.

IX.

The Court erred in overruling the objection made

by the attorney for the plaintiffs to the question propounded to the witness Frank H. Driscoll on cross-examination, as follows:

“XQ. What would be the value of a life estate in a right to receive the income from \$57,969.55 passing to a person forty years of age?

Mr. WOODWORTH.—We object to that question as incompetent, irrelevant and immaterial, and not within any of the issues involved here.

The COURT.—I will take it subject to the objection.

A. I would have to make my calculations. I haven't made them on that basis.

Mr. WOODWORTH.—We make the further objection, if your Honor please, that the question assumes that this sum did not vest previous to the repeal of the law.

The COURT.—He is not asking him that. He is asking what would be the value of a life estate in a right to receive the [77] income from that sum to a person forty years of age.

Mr. PIER.—Mr. Driscoll not having made these computations, and Mr. Rosenfeld not having given the dates of the births given later to Mr. Driscoll by Mr. Rosenfeld so that he can make the computations?

The COURT.—Yes; as you haven't all the evidence here you will abide by the statement of Mr. Rosenfeld as to the dates of the births, and Mr. Driscoll can make his computations. You had better have Mr. Rosenfeld furnish those to him and then hand them in and have them introduced in evi-

dence," to which ruling the Court duly and regularly allowed an exception.

X.

The Court erred in overruling the objection made by the attorney for the plaintiffs to the introduction in evidence, in connection with the testimony of the witness Frank H. Driscoll on cross-examination, the following memorandum prepared by said Frank H. Driscoll at the request of the attorney for the defendant and delivered by said Frank H. Driscoll to the official reporter to be incorporated in the official transcript of the trial of the above-entitled case, which said memorandum was and is as follows:

"San Francisco, Cal., April 8, 1914.

"The Honorable the United States District Court,
San Francisco, California.

"Sir: The following data, the result of computations of the life interests of the principal legatees of the estate of John Rosenfeld, deceased, May 28, 1902, in income from the sum of \$57,969.55, at 4%, \$2,318.782, are submitted:

To Henrietta Rosner, daughter, born May 4, 1860; age 42 years; amount taxable, \$33,903.42; rate \$1.12½ tax.....	\$381.41
To Sarah Epstein, daughter; born June 2, 1861; age 40 years; amount taxable, \$34,997.25; rate \$1.12½; tax....	393.72
To Louis Rosenfeld, son; born June 16, 1863; age [78] 32 years; amount taxable, \$36,020.45; rate, \$1.12½; tax	405.23

To Henry Rosenfeld, son, born June 22 1865, age 36 years, amount taxable, \$36,978.89, rate, \$1.12½; tax	416.01
To Lucy I. Weill, daughter, born August 16, 1869; age 32 yrs.; amount taxable, \$38,720.09; rate \$1.12½; tax.....	435.60
To Max L. Rosenfeld, son, born May 8, 1873; age 29 yrs.; amount taxable, \$39,882.27; rate \$1.12½; tax.....	448.74
<hr/>	
Total tax, \$2,480.71	

“In computing the foregoing the annuity, or present value of one dollar due at the end of each year during the life of a person of specified age was, as to each, as follows:

“Henrietta Rosner, 42 yrs., \$14,621.22; Sarah Eppstein, 40 yrs., \$15,092.95; Louis Rosenfeld, 38 yrs. \$15,534.21; Henry Rosenfeld, 36 yrs., \$15,947.55; Lucy I. Weill, 32 yrs., \$16,698.46; Max L. Rosenfeld, 29 yrs., \$17,202.25.

“Respectfully submitted,

“F. H. DRISCOLL.”

To which ruling the Court duly and regularly allowed an exception.

XI.

The Court erred in holding, as declared in its written opinion incorporated in the Bill of Exceptions: “That the vested interests of each (beneficiary) was to the income for life, since necessarily, under the terms of the will, the beneficiaries would

have and enjoy the income not only during the trust, but thereafter during their lives.”

XII.

The Court erred in not rendering judgment in favor of plaintiffs and against the defendant in the sum of \$4,062.90, that being the full amount of taxes assessed and collected by the defendant. [79]

XIII.

The Court erred in not holding that neither the *corpus* of the legacies left to the beneficiaries under the last will and testament of John Rosenfeld, deceased, nor the income therefrom, had ever vested previous to the repeal of the War Revenue Act on July 1, 1902, and that any taxes assessed and collected by the defendant came within the provisions of the Refunding Act of June 27, 1902.

XIV.

The Court erred in not holding that both the *corpus* of the legacies left to the beneficiaries under the last will and testament of John Rosenfeld, deceased, and any income therefrom, did not vest previous to the repeal of the War Revenue Act which took effect on July 1, 1902, and that any taxes assessed and collected by the defendant came within the provisions of the Refunding Act of June 27, 1902, as being taxes on contingent beneficial interests, it appearing that said John Rosenfeld died 32 days before the repeal of the War Revenue Act took effect on July 1, 1902, and that the administration of his estate had just begun and that the ten months period provided by the laws of the State of Califor-

nia for notice to creditors had not expired on July 1, 1902, and that the debts against said estate had not been ascertained and that said legacies under the last will and testament of John Rosenfeld, deceased, or any income therefrom, could not be ascertained or distributed until long after the repeal of the War Revenue Act took effect on July 1, 1902.

WHEREFORE, for many manifest errors committed by said Court, the plaintiffs through their attorney pray that said Court be directed to grant judgment in favor of said plaintiffs in the sum of \$2,998.80, with interest and costs as prayed for in their amended Complaint, and for such other and further relief as the Court may think meet and proper.

MARSHALL B. WOODWORTH,

Attorney for Plaintiffs. [80]

Service of the within Assignments of Error by copy admitted this 24 day of June, 1916.

JNO. W. PRESTON,

Attorney for Defendant

[Endorsed]: Filed Jun. 24, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [81]

[Title of Court and Cause.]

Clerk's Certificate to Record on Writ of Error.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing eighty-six (86) pages, numbered from 1 to 86, inclusive, are a full, true and correct copy of the record

and proceedings as enumerated in the praecipe for transcript on writ of error, as the same remain on file and of record in the above-entitled cause, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$51; that said amount was paid by the attorney for the plaintiffs, and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 22d day of August, A. D. 1916.

[Seal] WALTER B. MALING,
Clerk, U. S. District Court, Northern District of
California.

[Ten Cent Internal Revenue Stamp. Canceled
Aug. 22, 1916. W. B. M.] [87]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Second Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court, before you, or some of you, between Louis Rosenfeld and Henry Rosenfeld, as trustees under the Last Will and Testament of John Rosenfeld, deceased, plaintiffs in error, and Joseph J.

Scott, Collector of Internal Revenue, defendant in error, a manifest error hath happened, to the great damage of the said Louis Rosenfeld and Henry Rosenfeld, as trustees under the last will and testament of John Rosenfeld, deceased, plaintiffs in error, as by said complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 24th day of June, in the year of our Lord one thou-

sand nine hundred and sixteen.

[Seal]

WALTER B. MALING,
Clerk, U S. District Court, Northern District of
California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by

WM. C. VAN FLEET,

Judge. [88]

Service of within writ of error by receipt of copy
admitted this 24 day of June, 1916.

JNO. W. PRESTON,

U. S. Attorney.

The answer of the Judge of the District Court of
the United States, for the Northern District of Cali-
fornia, Second Division.

The record and all proceedings of the plaint
whereof mention is within made, with all things
touching the same, we certify under the seal of our
said Court, to the United States Circuit Court of
Appeals for the Ninth Circuit, within mentioned, at
the day and place within contained, in a certain
schedule to this writ annexed as within we are com-
manded.

By the Court.

[Seal]

WALTER B. MALING,
Clerk.

[Endorsed]: No. 14,615. United States Circuit
Court of Appeals for the Ninth Circuit. Louis
Rosenfeld et al., Plaintiffs in Error, vs. Joseph J.
Scott, etc., Defendant in Error. Writ of Error.

Filed Jun. 24, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2846. United States Circuit Court of Appeals for the Ninth Circuit. Henry Rosenfeld, as Sole Surviving Trustee of the Trust Created by the Last Will and Testament of John Rosenfeld, Deceased, Plaintiff in Error, vs. Joseph J. Scott, Collector of Internal Revenue, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filed August 22, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

At a stated term, to wit, the October Term, A. D. 1916, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the sixteenth day of October, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM B. GILBERT, Senior Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM H. HUNT, Circuit Judge.

No. 2846.

LOUIS ROSENFELD and HENRY ROSENFELD, as Trustees Under the Last Will and Testament of JOHN ROSENFELD, Deceased,

Plaintiffs in Error.

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue,
Defendant in Error.

**Order That Litigation be Continued in the Name of
Henry Rosenfeld.**

It having been suggested to the Court by Mr. Marshall B. Woodworth, Counsel for the Plaintiffs in Error, that Louis Rosenfeld, one of the plaintiffs in error and one of the trustees of the trusts created by the Last Will and Testament of John Rosenfeld, deceased, having died, and it appearing that it is proper that said litigation should be conducted in the name of the sole surviving trustee, to wit, Henry Rosenfeld;

IT IS HEREBY ORDERED that said litigation be henceforth conducted by said Henry Rosenfeld, as sole surviving trustee under the trusts of the last will and testament of John Rosenfeld, deceased, and that the title of the above-entitled cause be changed and all proceedings hereafter conducted as follows:

“Henry Rosenfeld, Sole Surviving Trustee of the Trust Created by the Last Will and Testament of John Rosenfeld, Deceased, vs. Joseph J. Scott, Collector of Internal Revenue.”